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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 337

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, ET AL.,

Appellants,

vs.

FRANK C. MOORE, COMPTROLLER OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION

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Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, NATIONAL LIFE INSURANCE COMPANY, PENN MUTUAL LIFE INSURANCE COMPANY, AND PHOENIX MUTUAL LIFE INSURANCE COMPANY (ORIGINAL PLAINTIFFS); AND AETNA LIFE INSURANCE COMPANY, THE PRUDENTIAL LIFE INSURANCE COMPANY OF AMERICA, AND THE UNION MUTUAL LIFE INSURANCE COMPANY (PLAINTIFFS ADDED BY STIPULATION),

Plaintiffs-Appellants,

against

FRANK C. MOORE, COMPTROLLER OF THE STATE OF NEW YORK,

Defendant-Respondent.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

Preliminary Statement

In compliance with the rules of the Supreme Court of the United States the plaintiffs-appellants named above respectfully submit this statement showing the grounds

upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment of the Court of Appeals of the State of New York made and entered in the above entitled cause on July 2, 1947.

I

Statutory Provisions Believed to Sustain Jurisdiction

The statutory provisions believed to sustain the jurisdiction of this appeal by the Supreme Court of the United States are contained in Sec. 237(a) of the United States Judicial Code, 28 U. S. C. 344(a).

II

Statute Involved

The statute of the State of New York the validity of which is involved is the portion of the Abandoned Property Law of the State of New York (Chapter I of the Consolidated Laws of New York) applicable to life insurance companies, particularly Chapters 498 (Sec. 2) and 497 of the Laws of 1944 of New York (pages 1021-1025), and the statute which they amend, Chapter 697 of the Laws of 1943 of New York (pages 1383-1416, particularly Art. I, pages 1384-5, and Art. VII, pages 1398-1401, and Articles XIV and XV, pages 1408-1415). The pertinent provisions of said statute are set forth in Exhibit A annexed hereto.

III

Date of Judgment and of Application for Appeal

The date of the judgment sought to be reviewed was July 2, 1947, and the date upon which the application for appeal is presented is August 15, 1947.

IV

The Nature of the Case and the Rulings in the New York Courts

The case is an action to have said Abandoned Property Law declared unconstitutional in its attempt to force payment to the State of New York (in the nature of escheat) of so-called "abandoned" policies of life insurance, including endowment policies, issued by the plaintiffs-appellants, which are life insurance companies incorporated in various other States and licensed to do business in the State of New York.

The facts are stated in the complaint and are conceded to be correct and both sides moved for judgment upon such conceded facts (R. 4-5).

In referring to the "statute" we mean to include the constructions placed upon the statute by the defendant, the State officer charged with its administration and enforcement, and the constructions placed upon the statute by the Court of Appeals.

Plaintiffs-appellants claim that the statute is repugnant to Article I, Sec. 10, of the Constitution of the United States because it impairs the obligations of the contracts in forcing the insurance companies to pay to the State of New York (as or in the nature of an escheat) the face amounts of such policies, and to make reports and newspaper publications offering and promising payment and admitting liability, all contrary to and without performance of the terms of the policies, particularly the provisions that the furnishing of due proofs of death, or other event, to the insurance companies is a condition precedent to liability and to payment (R. 13), it being conceded that no proofs of any kind have been furnished in connection with these policies (R. 19, 23, 27); and the provisions that if the

age of the insured was understated, as concededly it frequently is, the amount of insurance shall be reduced to the amount which the premium would have purchased at the correct age (R. 13-14), it being concededly impossible to know or determine the correct age or amount unless and until due proofs are submitted as required by the terms of the policies (R. 14, 23, 27); and the provisions excluding or reducing liability in case of suicide (R. 14), or of death caused by war, or military service, or aviation (R. 14-15), or if the insured was not living and in good health when the policy was delivered and the first premium paid (R. 13), it being concededly impossible to know or determine the amount of liability, if any, unless and until due proofs are furnished as required by the terms of the policies (R. 23, 27).

Plaintiffs-appellants also claim that the statute is repugnant to the Fourteenth Amendment to the Constitution of the United States because it takes the plaintiffs' property without due process of law requiring them to make the payments, reports and publications mentioned, contrary to and without performance of the policy provisions described in the preceding paragraph, and even though many defenses, total or partial, may exist to any claims which could arise under the policies, particularly defenses based upon the provisions described in the preceding paragraph, and also defenses based upon fraud, misrepresentation, impersonation, fictitious insureds, and other frauds (R. 14-15), it being concededly impossible to determine what defenses may apply unless and until due proof of death, or other event, is furnished as required by the terms of the policies (R. 23).

Plaintiffs-appellants also claim that the statute is repugnant to said provisions of Article I, Sec. 10 and of the Fourteenth Amendment because it deprives the plaintiffs

of all right and opportunity to receive, consider and investigate claims under said policies, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims (R. 29); and further because the assets and reserves of the plaintiffs are their general property in which they have the beneficial ownership, and are not deposits or trust funds and are not ear-marked or held under or for any particular policy (R. 12); and because the effect and result is that the State of New York virtually liquidates and takes over this part of the plaintiffs' business and assets, and deprives them of their property and of the right to conduct such business as authorized by their charters granted by the States in which they are incorporated (R. 29).

Plaintiffs-appellants also claim that such policies are not matured and do not represent funds or debtor obligations susceptible to escheat, or subject to the jurisdiction of the State of New York for such purpose, or a taking of that nature, and that the Court of Appeals erred in holding to the contrary and in sustaining the validity of the statute for that purpose, said holdings having no support in the record and being contrary to the conceded facts, and that said holdings and statute are accordingly repugnant to Article I, Sec. 10, and the Fourteenth Amendment by impairing the obligations of the contracts and depriving the plaintiffs of their property without due process of law.

Plaintiffs-appellants further claim that even if (contrary to their contentions) any sums are to be deemed held or owing under such policies, nevertheless the State of New York has no jurisdiction to compel such payments and other acts (in the nature of escheat), the proper jurisdiction (if anything is held or owing) being the State of incorporation (the domicile) of the insurance company which issued the policies (R. 25), and that the statute and the holding of the Court of Appeals sustaining jurisdiction of the State

of New York are therefore repugnant to the Fourteenth Amendment in taking the plaintiffs' property without due process of law, and subject and expose them to full liability under the same policies to the State of New York and to the State having jurisdiction (R. 30-1), or to policyholders who sue upon the policies in any State (R. 27-8). This claim is based upon the fact that the State of incorporation of each insurance company is the only known factor upon which situs and jurisdiction could properly be based, in addition to which it is concededly the place where the policies are payable by their terms (R. 13), where the funds with which to pay are located (R. 12), where all claims must be filed (R. 11), where premiums are payable (R. 11), where all applications for insurance are considered and where the policies are actually written (R. 11), where all checks, premium notices, etc., are issued (R. 11-12), where all policy loans are made (R. 11), and where the records and officers of the companies are located (R. 10-11).

It is impossible to fix situs or jurisdiction in the States in which the missing policyholders or beneficiaries or assignees may be domiciled because their domicile or whereabouts is unknown and undeterminable (R. 75). Nor could situs and jurisdiction be fixed in the State where the insured resided when the policies were issued many years ago (the test used in the statute) because this is also unknown and impossible to determine (R. 16, 26, 67), and the place of delivery (the test adopted by the New York courts to supplement the test of residence used in the statute) of these old policies is also unknown (R. 15), and neither test has any legal, logical or practical relevancy for the purpose of escheat, which relates to the present location of the property, not to its origin. (For example: Abandoned automobiles and other chattels escheat to the State where they are found, not where they were originally purchased. Aban-

doned bank accounts escheat to the State where the bank is located and where the money is payable, regardless of where the depositor lived. Funds deposited in courts escheat to the State where the court is located irrespective of where the funds came from. Authorities are cited later.)

The Federal constitutional questions sought to be reviewed were originally raised in the plaintiffs' complaint in the court of first instance, the Supreme Court of the State of New York, New York County, in which it was specifically alleged that "the statute is unconstitutional and void as to foreign life insurance companies, under the Constitutions of the United States and of the State of New York" (references to the latter being omitted here) "and the following provisions thereof: * * * 14th Amendment (* * * 'Nor shall any State deprive any person of * * * property, without due process of law * * *.') * * * Art. I, Sec. 10, ('No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *')" (R. 24), and said complaint states the reasons why the statute is repugnant to said provisions of the Constitution (R. 9-33), such reasons in so far as material here being mentioned in the preceding paragraphs of this statement. The Court rejected these contentions and sustained the validity of the statute in an opinion by Mr. Justice Gavagan reported at 187 Misc. (N. Y.) 1004, and dated September 30, 1946, a copy of which is Exhibit B annexed hereto, and by a judgment dated October 24, 1946 (R. 4-6).

Judge Gavagan's opinion, in so far as material here, held that the policies represented matured debts and that the insurance companies must pay to the State even though no proofs of death or other event had been furnished, and even though no one knows what sum, if anything, might ever actually become due under the terms of the policies. He left undecided the question of whether the statute could

deprive the companies of possible defenses, but this was later decided by the Court of Appeals in a manner which will be described later. He declared the statute unconstitutional as to policies delivered in other States (R. 71, 5).

His opinion also held that although the situs of any sums owing under these policies would be at the domiciles of the insurance companies, and although the domicile of a corporation is the State in which it is incorporated, nevertheless he held that as to policies delivered (the statute does not even mention delivery) in the State of New York the companies should be considered domiciled in New York, and concluded that New York had jurisdiction to escheat (R. 73, 76), if the policy had been delivered in New York, although many years ago, and if it had insured the life of a person who had been a resident of New York when the policy was delivered (R. 73, 76), disregarding the impossibility of determining the place of residence or of delivery (R. 15-6, 26, 67). As will be shown later, the Court of Appeals reached the same result as to jurisdiction, but upon a different theory.

An appeal from said judgment of October 24, 1946, was duly taken by the plaintiff insurance companies to the Appellate Division of the Supreme Court of the State of New York by notice of appeal dated October 25, 1946, and the same Federal constitutional questions were raised by the complaint and by the briefs and argument of the appellants, such being the only method by which such questions could be raised in said court, there being no provision in the law or practice of the State of New York requiring or permitting the filing of exceptions, assignments of error, or the like upon such an appeal. The case was duly heard and argued in the Appellate Division which unanimously affirmed the judgment of October 24, 1946, by an order of affirmance dated March 14, 1947 (R. 85-86). No opinion

was delivered upon this decision which is reported at 271 App. Div. (N. Y.) 1002. A judgment of affirmance dated March 19, 1947, was thereafter duly made by said Supreme Court, New York County, upon the order of affirmance of the Appellate Division (R. 86-87).

Thereafter the plaintiffs duly appealed to the Court of Appeals of the State of New York, the highest court of said State in which a decision in the suit could be had, and the same Federal constitutional questions were raised by said complaint and by the briefs and argument of the appellants, such being the only method by which such questions could be raised in said court under the law or practice of the State of New York which contain no provisions requiring or permitting the filing of exceptions, or assignments of error, or the like upon such an appeal, which was duly taken by notice of appeal dated March 19, 1947 (R. 84). The case was duly heard and argued in the Court of Appeals, which on July 2, 1947, by a judgment, a copy of which is Exhibit C annexed hereto, modified and, as modified, affirmed the judgment below. At the same time said Court of Appeals rendered its unanimous opinion written by Chief Judge Loughran, a copy of which is Exhibit D annexed hereto, reported at 297 N. Y. 1.

The only modification made by the Court of Appeals was to state that the insurance companies may assert any defenses to the escheat except "non-compliance with policy provisions calling for due proof of death or of other designated contingency" (Exhibit D, page 59) and other exceptions not material upon this appeal, but the opinion adds, "Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute" (Exhibit D, page 59). It is not a question of inconvenience but of impossibility (R. 23). The result is that the plaintiffs are

actually and effectively deprived of all defenses, and compelled to pay the State of New York even though concededly the conditions of the policy have not been fulfilled and no one can possibly know whether the insured is living or dead, or, if dead, when he died or where or how death occurred, etc., or how much, if anything, might ever become justly due under the policy.

The judgment and opinion of the Court of Appeals sustains the jurisdiction of the State of New York to escheat upon the theory that the contracts were "created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature" (Exhibit D, page 58).

The judgment of the Court of Appeals specifically holds that the statute is valid and not repugnant to the Constitution of the United States or to Article I, Sec. 10 thereof or to the Fourteenth Amendment thereto (Exhibit D, pages 57, 59).

The judgment of the Court of Appeals is a final judgment in the case and leaves nothing to be done by the lower court except the ministerial act of entering an order upon the remittitur in accordance with the judgment of the Court of Appeals (New York Civil Practice Act, Sec 607-a), and therefore said judgment of the Court of Appeals is reviewable by the Supreme Court of the United States as a final judgment (*Department of Banking of Nebraska* v. *Pink*, 317 U. S. 264). Such an order, making the judgment of the Court of Appeals the judgment of the said Supreme Court, New York County, was duly made by the latter on July 24, 1947.

From the foregoing it is clear that in this case there is drawn in question the validity of a statute of the State of New York on the ground of its being repugnant to the Con-

stitution or laws of the United States and that the final judgment here sought to be reviewed of the Court of Appeals, that being the highest court of said State in which a decision in this case could be had, is in favor of the validity of said statute. It further appears from the foregoing that such validity of the statute was first drawn in question by the plaintiffs-appellants in their complaint served at the commencement of this action and has thereafter been drawn in question at each subsequent stage of the proceedings in this case. Accordingly it is clear that under the provisions of Section 237(a) of the Judicial Code, 28 U. S. C. 344(a), the Supreme Court of the United States has jurisdiction to review upon appeal the final judgment of the Court of Appeals.

The cases believed to sustain jurisdiction are as follows:

Lynch v. *U. S.*, 292 U. S. 571, 579-580.
Home Ins. Co. v. *Dick*, 281 U. S. 397, 408.
Boswell v. *Security Mutual Life Ins. Co.*, 193 N. Y. 465.
Sturges v. *Crowninshield*, 4 Wheat. 122, 197.
Bank of Minden v. *Clement*, 256 U. S. 126.
People v. *The Security Life*, 78 N. Y. 114.
Uhlman v. *New York Life*, 109 N. Y. 421.
Pennoyer v. *Neff*, 95 U. S. 714, 733.
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227.
Columbia System v. *U. S.*, 316 U. S. 407, 417-8.
Anderson National Bank v. *Luckett*, 321 U. S. 233.
Security Bank v. *California*, 263 U. S. 282.
U. S. v. *Klein*, 303 U. S. 276.

V

The questions involved have never been presented to or passed upon by the Supreme Court of the United States, or any other Federal or State Courts prior to this case. They are substantial and important.

A

The first question is whether conditional contracts such as these life insurance policies are susceptible to escheat where concededly the terms and conditions precedent to liability, and to the amount of liability, have not been performed. Can the State statute declare the policies payable contrary to their terms, and deprive the companies of all possible defenses, in order to effect an escheat?

Each of these policies provides that it is payable only upon due proof of death or of other event. No such proof has been furnished. Yet the statute insists upon payment. It seeks to escheat what does not exist.

No one knows whether the insureds are living or dead. Even if they are dead, there is no liability until due proof of death is furnished. *Bergholm* v. *Peoria Life Ins. Co.*, 284 U. S. 489, a typical case, holds (pages 491-2) that "the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof*" thereof "which is definitely made a condition precedent" and to force payment without such proof "would be to vary the plain terms of a contract in utter disregard of long settled principles." The same rule applies in New York (*O'Reilly* v. *Guardian Mutual*, 60 N. Y. 169; *Wachtel* v. *Equitable Life*, 266 N. Y. 345), and elsewhere.

The New York Court of Appeals disposes of this by merely calling these policies "matured." That begs the question, we think. If "matured" means due or payable, they are not matured. The conditions have not been performed. To nullify these conditions and escheat the supposed proceeds of the policies is repugnant to Article I, Sec. 10, and to the Fourteenth Amendment (*Lynch* v. *United States*, 292 U. S. 571; *Home Ins. Co.* v. *Dick*, 281 U. S. 397).

Another reason given by the Court of Appeals for dispensing with due proof of death is that the production of a

bankbook may not be essential to the escheat of an abandoned bank account, citing *Provident Inst. for Savings* v. *Malone*, 221 U. S. 660, which held that a by-law of a Massachusetts bank requiring the production of the passbook could be ignored by the Massachusetts Legislature without creating a Federal question. The real distinction is that a bank account is a recognized debt, but as to these policies there is no debt until the proofs are furnished because their conditions have not been performed.

State legislatures can not tamper with contractual obligations merely because they may consider the provisions less important than do the contracting parties, as held in *Green* v. *Biddle*, 8 Wheaton 1, 84, as follows:

> "The objection to a law, on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation."

The unconstitutionality of such legislation is demonstrated in *Boswell* v. *Security Mutual Life Ins. Co.*, 193 N. Y. 465, 473; *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197; and many others. In the *Boswell* case the opinion states (p. 474) "In 2 Story on the Constitution (Sec. 1385) the learned author lays down the rule as follows: 'It is perfectly clear, that any law which enlarges, abridges or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it.'"

Each of these policies may be subject to many possible defenses. We say "possible" defenses because at present it is concededly impossible to determine which defenses may apply to which policies, and concededly this can only be

done when the due proofs required by the terms of the policies have been furnished to the insurance companies.

Some of these defenses are based upon the contract terms (described earlier in this statement) such as the condition that the policies are payable only upon due proof of death, etc., the requirement of good health when the policy was issued, and the provisions as to age, suicide, war and aviation clauses, etc. Others may arise from fraud, misrepresentation, impersonation, etc.

A defense is property, just as much as a right of action, and is equally protected by the Constitution. *Pritchard v. Norton*, 106 U. S. 124, 132, states the principle as follows:

> "Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away. A vested right to an existing defence is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice."

The Court of Appeals says that the statute does not take away these defenses except the defense that due proof has not been furnished, but that exception in effect destroys any other defenses. It does so by forcing a premature assertion of these defenses in the face of the conceded fact that it is impossible to ascertain which defenses, if any, may apply unless and until due proofs of death or other event have been furnished.

A defense is a right to resist a claim at the proper time. It is not the privilege of embarking upon a costly and concededly hopeless search for information about these missing policyholders in order to presently assert hypothetical defenses to hypothetical claims. The policies contain no such

obligation, and none was ever intended. On the contrary, the very purpose of requiring due proof of death was to enable the companies to learn where, how, and when the death occurred, whereupon further investigations could be made to determine what defenses might then exist. In *Aetna Life* v. *Moyer*, 113 F. 2d 974, 977, the Court said that the purpose of a policy provision "requiring due proof * * * is self-evident" and "is designed to give the insurer reasonable opportunity to investigate and test the validity of the claim."

It should also be noted that the statute and its interpretation by the Court of Appeals also deprives the plaintiffs of all right and opportunity to consider and investigate claims, and to reject or resist unjust or fraudulent claims, or to adjust doubtful claims; and virtually liquidates and takes over this part of the plaintiffs' business and assets, in which concededly they have the beneficial ownership, no trust funds being involved and nothing being ear-marked or held for any particular policy; and deprives them of their right to conduct their business as authorized by their charters granted by the States in which they are incorporated. It is claimed that no sound reason has been given by any of the New York Courts for depriving the plaintiffs of these rights, which appear to be brushed aside upon the theory that the policies represent ordinary debts like bank accounts, which is claimed to be contrary to the conceded facts and entirely unsupported by the record.

It is contended that such an attempt, by direction and indirection, to impair the obligations of the contracts and to take the companies' property without due process is repugnant to Article I, Sec. 10, and to the Fourteenth Amendment.

Neither the Supreme Court of the United States, nor any other Court, prior to this decision has ever held that the

doctrine of escheat could apply to unperformed insurance policies or to any other unperformed conditional contracts, as distinguished from recognized debts such as bank accounts where a definite sum is payable unconditionally upon mere demand (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282), and funds deposited in Courts as conceded debts payable to unknown persons (*U. S.* v. *Klein*, 303 U. S. 276, also cited at 106 F. 2d 213, cert. denied, 308 U. S. 618).

This statutory attempt to extend the doctrine of escheat to conditional contracts such as life insurance is fraught with grave danger. In the field of insurance alone one might well ask why it could not be extended to fire, automobile, fidelity and other types of insurance on the theory that if a loss occurred some arbitrary or estimated sum should escheat to the State if not claimed by the policyholder. In other fields, all types of conditional or contingent liabilities could be subjected to escheat on some estimated basis. There is no real distinction between these and life insurance. Insurance is not analogous to a bank account except perhaps in the popular conception which seems to have influenced the Legislature in attempting to deal with these policies as ordinary debts, forgetting their highly conditional nature both as to liability and as to amount of liability.

B

The second question is whether the State of New York has jurisdiction to escheat even if these policies are "matured" as asserted by the Court of Appeals.

The statute originally applied to policies issued by New York companies, but the amendment which caused the present litigation extended the statute to companies incorporated in other States (R. 47). New York is the only State which attempts to take jurisdiction of policies issued

by foreign companies, such as the plaintiffs. Similar statutes in other States are limited to policies issued by domestic corporations (Massachusetts, Gen. Laws, Ch. 175, as amended by Ch. 455, of the Laws of 1946; New Jersey, Laws of 1946, Ch. 154; Pennsylvania, Title 27, Ch. 6, Secs. 434-447).

New York claims jurisdiction to escheat if the policies were delivered in New York upon the lives of persons who were residents of New York when the policies were delivered. The other States claim jurisdiction if the insurance companies which issued the policies are domestic corporations. Here is a jurisdictional conflict which can only be authoritatively resolved by the Supreme Court of the United States. Unless it is resolved, the insurance companies must pay the full proceeds of many policies to two States, one claiming jurisdiction based on the place of delivery, the other basing jurisdiction upon the place of incorporation of the insurance company. Also, if New York lacks jurisdiction payment to the State will be no defense to suits by the policyholders in any State.

The same property can only escheat to one State, and the appellants contend that the State of incorporation (the domicile) of the insurance companies is the proper jurisdiction (if these policies are subject to escheat at all). A taking of property without jurisdiction is a taking without due process of law (*Pennoyer* v. *Neff*, 95 U. S. 714).

The reasons why the State of incorporation of the companies is the only proper and practical jurisdiction have been outlined earlier in this statement. Briefly, the reasons are that it is the only known factor upon which situs and jurisdiction could be based, the domiciles of the missing policyholders or beneficiaries being concededly unknown; it is the place where the policies are payable by their terms, and where the assets behind the policies are located, and

where all claims and other transactions in connection with the policies must be made under the terms thereof; and not least perhaps is the fact that the policyholder selected a company in a foreign jurisdiction and sent his money there. If a person sends his money to a bank in a foreign State no one would question the right of that State to take jurisdiction for the purpose of escheat.

Escheat is a reverting of title to the sovereign within whose domain the property is situated. It matters not where the property originated. It is not related to local regulation or taxation of foreign corporations, or to jurisdiction for the purpose of remedies such as attachment or service by publication. In the case of an abandoned corporate debt the State of incorporation has primary jurisdiction over the debtor and over "the mass of property" which stands behind the debt (*Anderson National Bank* v. *Luckett*, 321 U. S. 233). It is true that in a sense practically all the forty-eight States have jurisdiction over these foreign insurance companies for some purposes, but concededly it would be chaos to have each policy escheat to every State. Therefore, we must look to the primary jurisdiction of the State of incorporation. There and only there is a situs which satisfies not only the theory of sovereignty but also the concept that, in a union of many sovereign States, situs and jurisdiction should be based upon common sense and justice under the particular circumstances, as stated in *Severnoe Securities* v. *L. & L. Ins. Co.*, 255 N. Y. 120 (1931), in which Judge Cardozo analyzed the situs of debts as follows:

> (page 123) "* * * The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor" (but in the case at bar this is concededly unknown) "for others, the domicile or

> place of business of the debtor * * *" (the State of incorporation of the insurance company is always known) "for others, any place where the debtor can be found" (the insurance companies do business in practically every State and property can escheat to only one State). "At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions * * *."

Applying this rule we find that the State of incorporation of the insurance company is the only practical and logical jurisdiction, and it is in harmony with the legislation of all other States which have thus far attempted to apply the principle of escheat to such policies.

This reasoning is in accord with the decisions of the Supreme Court of the United States in the cases holding that abandoned bank accounts escheat to the State in which the bank is situated, where the account was payable (*Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Bank* v. *California*, 263 U. S. 282). No State has ever attempted to escheat accounts in banks incorporated in other States. It is also in accord with the rule that funds on deposit in a Federal Court escheat to the State in which the Federal Court is located, since the fund is deemed to be within the State and is payable there (*U. S.* v. *Klein*, 303 U. S. 276, also cited at 106 F. 2d 213, cert. denied 308 U. S. 618). No State has ever attempted to escheat funds on deposit in a court located in another State.

The cases cited involved recognized debts payable to someone. They all hold that the State in which the debtor corporation is domiciled (*i.e.*, incorporated) is the proper jurisdiction for escheat. None of these cases involve conditional contracts such as these insurance policies, where

nothing is payable until the conditions are performed and where the amount payable, if anything, is entirely unknown to anyone at the present time.

The New York Legislature apparently realized the unconstitutionality of the statute and promptly passed a bill to repeal it as to foreign life insurance companies (Assembly Introductory No. 2268, Print No. 2551, March 23, 1945), which was vetoed by the Governor on April 16, 1945, because the domestic insurance companies objected to other provisions of the bill.

Conclusion

It is respectfully submitted that the statute referred to herein is unconstitutional in that it is repugnant to Article I, Sec. 10, by impairing the obligations of the contracts issued by the plaintiffs, and also is repugnant to the Fourteenth Amendment by taking plaintiffs' property without due process of law. Accordingly, the judgment of the Court of Appeals of the State of New York, dated July 2, 1947, and now appealed from, should be reversed with directions to reverse the judgment of the Supreme Court of the State of New York, County of New York, dated October 24, 1946, and to reverse the order of affirmance of said judgment by the Appellate Division, First Department, of said Supreme Court dated March 14, 1947, and to reverse the judgment of affirmance dated March 19, 1947, entered in said Supreme Court, New York County, upon said order of affirmance, and said statute should be declared to be entirely void in its application to the appellants, foreign life insurance companies, and to the policies issued by them, in that it is repugnant to said provisions of the Constitution of the United States.

Dated: August 15, 1947.

GANSON J. BALDWIN,
Attorney for Appellants.

EXHIBIT A

Text of the Abandoned Property Law of the State of New York, as amended, insofar as it applies to life insurance companies, being Chapter 697 of the Laws of 1943, as amended by Chapters 497 and 498 (Sec. 2) of the Laws of 1944, also known as Chapter 1 of the Consolidated Laws of the State of New York.

Note:

In Sec. 103 the words in italics were added, and the words in brackets were deleted, by Chapter 498 (Sec. 2) of the Laws of 1944 thereby making the statute apply to foreign life insurance corporations.

In Secs. 700, 701, 702 and 703, the words in italics were added, and the words in brackets were deleted, by Chapter 497 of the Laws of 1944.

ARTICLE I—Short Title; Declaration of Policy; Definitions

§ 101. Short title.

This chapter shall be known and may be cited as the "Abandoned Property Law."

§ 102. Declaration of policy.

It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose.

§ 103. Definitions.

. . . . . .

(d) "[Domestic] Life insurance corporation" means any [authorized] insurer corporation [incorporated and] organized under [any] *the* laws of this state [having power] *or any foreign corporation authorized* to do either one or

both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law, as amended from time to time.*

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*Note:

The Insurance Law, Sec. 46, paragraphs 1 and 2, read as follows:

1. "Life insurance," meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.

2. "Annuities," meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one.

ARTICLE VII—Unclaimed Life Insurance Funds

§ 700. Unclaimed [domestic] life insurance corporation moneys.

1. The following unclaimed property held or owing by [domestic] life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any [domestic] life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any [domestic] life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents

of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted, kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any [domestic] life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years.

2. Any such abandoned property held or owing by a [domestic] life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

§ 701. Annual report of abandoned property.

1. On or before the first day of April in each year every [domestic] life insurance corporation shall make a verified written report to the state comptroller, which shall contain a true and accurate statement, as of the first day of January next preceding, of all abandoned property specified in section seven hundred, held or owing by it.

2. Such report shall set forth:

(a) The name and last known address of any person or persons appearing from the records of such [domestic] life insurance corporation to be entitled to receive any such abandoned property;

(b) The amount appearing from the records of such corporation to be due;

(c) The policy number and policy age of the insured;

(d) The date such abandoned property was payable;

(e) The names and last known addresses of each beneficiary appearing in the records of the insurer; and

(f) Such other identifying information as the state comptroller may require.

3. Such report shall be in such form and the abandoned property listed shall be classified in such manner as the state comptroller may prescribe. Names of persons appearing to be entitled to such property or of beneficiaries appearing in such report shall be listed in alphabetical order within each such classification.

4. In case any [domestic] life insurance corporation shall on the first day of January in any year neither hold nor owe any abandoned property specified in section seven hundred, it shall on or before the first day of April next succeeding make a verified written report to the state comptroller so stating.

§ 702. Publication of list of abandoned property.

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section seven hundred one, such life insurance corporation shall cause to be published a notice entitled: "Notice of names of persons appearing as owners of certain unclaimed property held by (name of life insurance corporation)."

2. Such notice shall be published once [in two newspapers published in the city or village] *a week for two successive weeks in a newspaper published in the county of the state* in which is ~~located~~ the last-known address of the holder of a policy under which such abandoned property is payable. [; provided, however, that if such address is in the city of New York, such publication shall be in two newspapers published in the county where such address is located. If there is only one newspaper published in any such city or village, such notice shall be published in such newspaper and in a newspaper published in the county where such

address is located. If there are no newspapers published in such city or village, then such publication shall be in two newspapers published in the county where such address is located, or, if there is only one such newspaper published in such county, then in such newspaper, or, if there are no newspapers published in such county, then in a newspaper published in an adjacent county. All newspapers in which such notice shall be published shall be newspapers printed in the English language.] *If there are no newspapers published in such county then such notice shall be published in a newspaper published in an adjacent county. If such last-known address is outside of the state of New York, such publication shall be in such newspaper published in this state as may be designated by the state comptroller. Such notices shall be published in newspapers printed in the English language.*

3. Such notice shall, in accordance with the classification prescribed by the state comptroller for the report pursuant to the provisions of section seven hundred one, set forth:

(a) the names and last known addresses which were in such report, of all persons appearing to be entitled to any such abandoned property amounting to ten dollars or more. Such names shall be listed in alphabetical order. [If, however, such life insurance corporation has reported abandoned property payable on policies whose holders' last known addresses are in more than one city or village or, in the case of New York city, more than one county, the names shall be listed alphabetically for each such city, village or county and such notice shall include only the names of the persons appearing to be entitled to abandoned property payable on policies whose holders' last known addresses are in such city, village or county;]

(b) such other information as the state comptroller may require; and

(c) a statement

(i) that a report of unclaimed amounts of moneys held or owing by it has been made to the state comptroller and that a list of the names of the person or

persons appearing from the records of such life insurance corporation to be entitled thereto is on file and open to public inspection at its principal office or place of business in any city, village or county where any such abandoned property is payable;

(ii) that such unclaimed moneys will be paid by it on or before the succeeding thirty-first day of August to persons establishing to its satisfaction their right to receive the same; and

(iii) that in the succeeding month of September, and on or before the tenth day thereof, such unclaimed moneys still remaining will be paid to the state comptroller and that it shall there upon cease to be liable therefor.

4. Such life insurance corporation shall file with the state comptroller on or before the tenth day of May in each year proof by affidavit of such publication.

§ 703. Payment of abandoned property.

1. In such succeeding month of September, and on or before the succeeding tenth day thereof, every such [domestic] life insurance corporation shall pay to the state comptroller all abandoned property specified in such report, excepting such abandoned property as since the date of such report shall have ceased to be abandoned.

2. Such payment shall be accompanied by a statement setting forth such information as the state comptroller may require relative to such abandoned property as shall have ceased to be abandoned.

§ 704. Life insurance departments of savings and insurance banks.

(Note: Not pertinent.)

§ 705. Unclaimed property held by superintendent of insurance after liquidation.

(Note: Not pertinent.)

§ 706. Payment of abandoned property after liquidation by superintendent of insurance.

(Note: Not pertinent.)

Note: Subsequent to the commencement of the action, the following section was added by Ch. 452 of the Laws of 1946, approved April 4, 1946:

Sec. 707. Reimbursement for claims paid by insurers. Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller.

ARTICLE XIV—General Provisions

§ 1400. Statutes of limitations not a bar.

The expiration of any period of time specified by law, during which an action or proceeding may be commenced or enforced to secure payment of a claim for money or recovery of property, shall not prevent any such money or property from being deemed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver to the state comptroller any such abandoned property; and shall not serve as a defense in any action or proceeding by or on behalf of the state comptroller to compel the filing of any report or the payment or delivery of any abandoned property required by this chapter or to enforce or collect any penalty provided by this chapter.

§1404. Assumption of liability by the state.

1. The care and custody • • •

(i) • • • of all abandoned property paid to the state comptroller pursuant to this chapter, is hereby assumed for the benefit of those entitled to receive the

same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund.

• • •

2. Any person, copartnership, unincorporated association or corporation making a payment of abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property.

3. No action shall be maintained against any person, copartnership, unincorporated association or corporation, or any officer thereof, for

(a) the recovery of abandoned property paid to the state comptroller pursuant to this chapter or for interest thereon subsequent to the date of the report of such abandoned property to the state comptroller pursuant to this chapter; • • • or

(c) damages alleged to have resulted from any such payment.

§1405. Interest not to run after report of abandoned property.

Notwithstanding any other provision of law, no owner of abandoned property shall be entitled to receive interest on account of such abandoned property from and after the date a report of such abandoned property is made to the state comptroller pursuant to this chapter, whether or not he was entitled to interest on such property prior to such date. No claimant to abandoned property heretofore paid to the state comptroller shall be entitled to receive interest on account of such property, whether or not he was entitled to interest on such property prior to such payment.

§1406. Claims for abandoned property heretofore or hereafter paid to the state.

1. (a) Claim may be filed with the state comptroller for any abandoned property heretofore paid to the state or hereafter paid to the state comptroller pursuant to this chapter * * * (Note: Part omitted is not pertinent to life insurance.)

(b) The comptroller shall possess full and complete authority to determine all such claims and shall forthwith send written notice of such determination to the claimant. At any time within four months thereafter, such claimant may apply for a hearing and a redetermination of his claim. After an appropriate hearing on notice, before the comptroller or person duly designated by him, the comptroller shall make and serve his final determination, which alone shall be reviewable by application to the supreme court, Albany County, upon not less than ten days' notice to the comptroller.

(c) The comptroller, or any person duly designated by him, is empowered to take testimony and proofs, under oath, upon such hearing, and shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to such hearings.

* * *

§1407. Payment by state comptroller.

Any claim which is allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction pursuant to the provisions of section fourteen hundred six, together with such costs and disbursements as may be allowed by the court, shall be paid out of the abandoned property fund and the comptroller shall not be liable in any action for any claim paid by him in good faith. There shall be deducted by the state comptroller from any claim allowed or the amount, other than costs and disbursements allowed by the court, of any claim ordered to be paid by him by a court of competent jurisdiction, one per cent, but in no event less than three dollars, from any such payment as a service charge, and such amount shall remain in the abandoned property fund.

If during any session of the legislature there are insufficient moneys in the abandoned property fund to pay all claims which have been allowed by the state comptroller or ordered to be paid by him by a court of competent jurisdiction, the state comptroller shall so certify to the legislature, which shall appropriate from the general fund to the abandoned property fund* an amount sufficient to pay such claims.

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*Note:

Whenever the Abandoned Property Fund exceeds $750,000, the excess becomes the absolute property of the State of New York, under the State Finance Law of New York, Sec. 95.

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§1408. Verification.

Any report required to be verified by this chapter shall be verified, if made by a person by such person, if made by a partnership by one of the members thereof, if made by an unincorporated association or private corporation by the president or by a vice-president and one other principal officer thereof, and if made by a public corporation by the chief fiscal officer thereof.

§1409. Payment for publication.

Any amount paid by a person to a newspaper or newspapers for any publication of names as required by this chapter shall be charged prorata against all abandoned property held or owing by such person at the time of such publication, except abandoned property of individual amounts of less than ten dollars.

§1410. Designation of newspapers.

Any notice required by this chapter shall be published in such newspapers as shall be designated by the state comptroller, except that in no case shall a notice be published in a newspaper other than one specified in the section requiring such publication.

§1411. Waiver of publication.

The state comptroller may waive the publication of any notice required by this chapter, except a notice required by section fourteen hundred two, whenever in his opinion the cost of publishing such notice would be unreasonable in relation to the amount of abandoned property.

§1412. Penalty for failure to report or file.

Any person failing to make any report or to file any affidavit required by this chapter shall forfeit to the people of the state the sum of one hundred dollars for each day such report or affidavit shall be delayed or withheld, except that the state comptroller may extend the time for making any such report or filing any such affidavit and may waive the payment of any penalty or part thereof provided for by this section.

§1413. Penalty for fraudulent returns.

The making of a willful false oath in any report required under the provisions of this chapter shall be perjury and punishable as such according to law.

§1501. Constitutionality.

If any part, provision or section of this chapter, or the application of any such part, provision or section in any particular respect, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective in whole or in part, such judgment shall be confined in its operation to the particular provision or section or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their application in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect.

EXHIBIT B

SUPREME COURT, NEW YORK COUNTY, SPECIAL TERM, PART ONE

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, et al., Plaintiffs,

against

FRANK C. MOORE, Comptroller of the State of New York, Defendant

GAVAGAN, J.:

This motion by the Attorney General of the State of New York, for judgment on the pleadings dismissing the complaint, presents the question of the constitutionality of Article VII of the Abandoned Property Law in so far as it purports to apply to foreign life insurance companies licensed to do business in this state, as well as other constitutional questions affecting domestic as well as foreign life insurance companies.

The action is brought by five life insurance companies, incorporated in other states but doing business here pursuant to license, against the Comptroller of the State of New York. It seeks (1) a declaratory judgment that Article VII of the Abandoned Property Law is unconstitutional and void as to plaintiffs, and (2) an injunction against attempts by the Comptroller to enforce the statute against them.

The Abandoned Property Law provides for the turnover to the state of property unclaimed by the owners thereof for such a length of time as to justify a presumption of abandonment. A mode of procedure is set up whereby the state takes such property into its custody and utilizes the same or its proceeds for the benefit of all the people until claim is made by the true owners. The first attempt to bring life insurance policies within the statute was in 1939 (Chapter 923 of the Laws of 1939). The statute was ex-

pressly limited to domestic companies. An action was commenced by New York Life Insurance Company for judgment declaring the 1939 law unconstitutional. The suit was withdrawn, however, after the 1940 Legislature had amended the statute by restricting its application to policies "issued on the lives of residents of this state" (Ch. 602, L. 1940). In 1944 the statute was amended so as to apply also to foreign life insurance companies authorized to issue policies of life insurance or annuities under "paragraphs one and two of section forty-six of the insurance law" (Chap. 497, 498, L. 1944). In 1945 the Legislature passed a bill eliminating foreign companies from the scope of the statute. However the bill also made the statute applicable to all policies issued by domestic companies by removing the existing restriction to policies issued upon the lives of residents, adopted in 1940. The bill was vetoed by the Governor, perhaps because of this proposed extension of the statute to all policies issued by domestic companies.

Article VII of the Abandoned Property Law deals with "unclaimed life insurance funds. It consists of eight sections, numbered 700 to 707 inclusive. Section 700, defining what shall be deemed abandoned property, reads as follows:

"§700. Unclaimed Life Insurance Corporation Moneys

1. The following unclaimed property held or owing by life insurance corporations shall be deemed abandoned property:

(a) Any moneys held or owing by any life insurance corporation which shall have remained unclaimed for seven years by the person or persons appearing to be entitled thereto under matured life insurance policies on the endowment plan issued on the lives of residents of this state.

(b) Any moneys held or owing by any life insurance corporation which are payable under other kinds of life insurance policies issued on the lives of residents of this state where the insured, if living, would, prior to the thirty-first day of December next preceding the report required by section seven hundred one, have attained the limiting

age under the mortality table on which the reserves are based, exclusive of

(i) any policy which has within seven years been assigned, readjusted kept in force by payment of premium, reinstated or subjected to loan, or

(ii) any policy with respect to which such corporation has on file written evidence received within seven years that the person or persons apparently entitled to claim thereunder have knowledge thereof.

(c) Any moneys held or owing by any life insurance corporation due to beneficiaries under policies issued on the lives of residents of this state who have died, which moneys shall have remained unclaimed by the person or persons entitled thereto for seven years,

2. Any such abandoned property held or owing by a life insurance corporation to which the right to receive the same is established to the satisfaction of such corporation shall cease to be deemed abandoned.

Section 701 provides that on or before each April first every life insurance company shall make a report to the Comptroller of property deemed abandoned by virtue of the provisions of section 700. Section 702 requires each company, within thirty days after its report to the Comptroller, to publish a list of persons appearing to be the owners of unclaimed property held by the company. The list is to be accompanied by a statement that moneys unclaimed by the succeeding thirty-first day of August will be paid to the State Comptroller and that the company shall thereupon cease to be liable therefor. Section 703 directs each company to pay to the Comptroller, in September, all property listed in its annual report as abandoned, except such property as shall have ceased to be abandoned since the date of the report. Sections 704, 705 and 706 are immaterial here. Section 707, added by chapter 452 of the Laws of 1946, declares that "any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may

make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

Article XIV of the Abandoned Property Law, entitled "General Provisions," contains a number of sections (1400 to 1413 inclusive) applicable to all the preceding articles, including Article VII. Section 1400 provides that the expiration of the statute of limitations applicable to actions or proceedings against the insurance companies shall not prevent the claims against the companies from being deemed abandoned and shall not be a defense in a proceeding by the Comptroller to compel the filing of a report or the payment of the abandoned property to him. Section 1401 obligates the Comptroller to keep a public record of the names and addresses of the persons appearing to be entitled to the abandoned property. Section 1402 requires the Comptroller to publish in October of each year a statement of the abandoned property delivered or paid over to him, with the names and last known addresses of the persons appearing to be entitled thereto, together with a statement that a claim for the property should be filed with the Comptroller and that a service charge of one per cent, but not less than $3, must be retained by the Comptroller in connection with each claim allowed or established. Section 1403 is not material here. Section 1404 declares that the care and custody of the abandoned property paid to the state is "hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund." The section further relieves any company paying abandoned property to the Comptroller from all liability with reference to such property and provides that no action shall be maintained against such company for the recovery of the property or for damages alleged to have resulted from such payment. Section 1405 declares that no owner of abandoned property shall be entitled to receive interest after the date of the report of abandoned property to the Comptroller. Section 1406 provides for the filing of claims to abandoned property

with the Comptroller and vests in him full authority to determine claims, subject to the power of the Supreme Court to review his determination. Section 1407 requires the Comptroller to deduct from any allowed claim one per cent. thereof, but not less than $3, as a service charge. It also provides for additional appropriations by the legislature when necessary to keep the abandoned property fund sufficient to pay allowed claims. The remaining sections of Article XIV are unimportant for the purposes of this motion, except perhaps section 1412, which imposes a penalty of $100 upon any person failing to file a report required by the statute, for each day that the report is delayed or withheld.

For the purposes of the present motion the allegations of the complaint must be deemed true. That pleading alleges that plaintiffs are incorporated in states other than New York and "for a great many years have done business in most of the other States of the United States pursuant to licenses granted by such States." It further appears from the complaint that the business of plaintiffs is conducted from their Home Offices, located in the states of their incorporation, where their officers, records and securities are situated; that applications for policies are obtained by agents and sent to the Home Offices for consideration, and if approved, that the policies are written at the Home Offices and sent to the agents for delivery to the applicants. Premiums are payable at the Home Offices, or, if paid to agents, are forwarded to the Home Offices. Notices as to premiums coming due and as to policy loans, interest on policy loans, lapses, etc., are mailed from the Home Offices. Loans on policies are considered and made at the Home Offices, and loan checks are drawn at the Home Offices and mailed to the policyholders or to agents for delivery to policyholders. "Claims under policies must be made at the Home Offices, under the terms of the policies, which provide that upon receipt at the Home Office of 'due proof' of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to the terms of the policies, are paid by checks drawn at the Home Offices."

The complaint further alleges that "policies issued by the companies upon the lives of persons who appeared to reside in this State frequently have been and are delivered in some other State, and the premiums paid in other States"; that "policies issued by the companies frequently have been and are applied for and obtained in another State by an employer, creditor, partner, husband, wife, parent, or other person, for his or her own benefit, upon the life of a person who appeared to reside in this State"; and that "every year thousands of persons holding policies issued by the companies, including vested beneficiaries and assignees, have changed their residences from one State to another, and they continue to do so."

In the light of these allegations, plaintiffs contend that the legislature of this state had no jurisdiction or power to direct a turnover to the state of "abandoned" claims upon insurance policies issued by them on the lives of New York residents. It is important to note that the statute, as it is worded, is not limited to policies issued or delivered in New York State, as part of the business which plaintiffs are licensed to do here. Article VII is directed at all "life insurance corporations," a term defined in section 103 as including "any foreign corporation authorized to do either or both kinds of insurance business authorized in paragraphs one and two of section forty-six of the insurance law as amended from time to time." Under this statute, any foreign company, authorized to do a life insurance or annuity business here, is obliged to turn over to the state the amounts of all "abandoned" insurance policies "on the lives of residents of this state." It matters not that the person on whose life the policy was written may never have had any interest in the proceeds of the policy (the policy may have been applied for by a creditor or relative of the insured). It is immaterial that the policy may have been applied for, written and delivered outside the State of New York. It is of no consequence that the policy may be payable outside the state or that the person entitled to payment, and whose failure to make claim is deemed an abandonment under the statute, may never have resided in the state. All that is necessary is that the policy insure the life of a New York resident.

It would seem to be obvious that the legislature of this state would be without jurisdiction or power to compel foreign insurance companies, *merely because they are licensed to do business here*, to turn over to the state the amounts of all unclaimed insurance policies, *wherever written and delivered, and wherever and to whomsoever payable*. Nor would restriction of the statute to policies on the lives of New York residents alter the legal situation, irrespective of the date used for determining the insured's residence, for the residence of the person whose life is insured is not the proper criterion, by itself, for determining the situs of a claim upon a policy. The policy may have been obtained on the application of someone other than the insured and it may be payable to someone other than the insured. As to policies resulting from business done outside the state and having no relation to the license to do business here, the state is without jurisdiction. In U. S. Mortgage & Trust Co *v.* Ruggles, 258 N. Y. 32, the Court of Appeals declared (p. 40): "The State may not constitutionally regulate or interfere with the acts of foreign corporations outside its limits nor with the liberty of parties to take out contracts of insurance whenever they desire and collect the proceeds thereof. * * * the New York statute * * * could reach only business transacted within the State." In Mutual Life Ins. Co. *v.* Cohen, 179 U. S. 262, the United States Supreme Court ruled that a New York statute, prohibiting the lapsing of policies for non-payment of premiums or interest unless a notice had been mailed prior to the due date, would be unconstitutional if it applied to policies issued in other states by foreign insurance companies. The court said (p. 269): "That the legislature of New York could not control companies not organized under its laws as to their business transacted in other States is too clear for argument." In Alaska Packers *v.* Industrial Accident Commission, 294 U. S. 532, the Supreme Court declared that (p. 540): "The due process clause denies to a state any power to restrict or control the obligation of contracts executed and to be performed without the State, as an attempt to exercise power over a subject matter not within its constitutional jurisdiction." In Home Ins. Co. *v.* Dick, 281 U. S. 397 the same court stated (p. 410) that

"It (the state) may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."

The determination of the situs of intangibles depends on a "common sense appraisal of the requirements of justice and convenience" in the particular situation involved (Severnoe Securities Corp. *v.* L. & L. Ins. Co., 255 N. Y. 120, 123 [Cardozo, Ch. J.]): "The situs of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal situs be ascribed to them. The locality selected is for some purposes, the domicile of the creditor, for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged, for others, any place where the debtor can be found. * * * at the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions." Applying this test to the case under consideration, we find that the criterion for determining situs contained in the Abandoned Property Law, viz., the residence of the insured, is not one which satisfies the requirements of justice and convenience. The primary domicile of the debtor (the state of incorporation of the insurance company), the domicile of the creditor (the person entitled to the proceeds of the policy), the place where the contract of insurance was made, the physical location of the policy itself, and the place where the contract embodied in the policy is to be performed,—these are all ignored in the statute presently under attack. That the selection of the residence of the insured as the sole criterion of situs for purposes of transferring to the state the amounts of all abandoned policy claims does not satisfy the requirements of justice and convenience must be too evident to need elaboration. States where the contracts of insurance were made, where the debtor insurance companies are incorporated, and/or where the persons entitled to the proceeds of the policies reside, certainly have better and stronger rights to assert jurisdiction over the abandoned policy claims. It is neither just nor convenient, as far as the debtors and creditors on the policies are concerned, for the State of New York to compel foreign insurers to turn over to it proceeds of policies of insurance which

have no connection whatsoever with the business done by them in New York and which bear no relationship whatever to this state, except for the residence of the persons on whose lives the policies were issued. As a practical matter, hardship would be likely to result to the foreign insurers if they were obliged to yield to New York as to such policies. Compliance with the New York statute might well subject such foreign companies to double liability, complete or partial. Other states with better rights to exercise jurisdiction may pass similar statutes, and it would be no defense to the companies, as against attempts to enforce those statutes, that they had complied with the laws of New York, whose claim to jurisdiction rested solely on the insured's residence there. Indeed, the complaint alleges that the States of Michigan, Pennsylvania and Kentucky have already enacted similar statutes and that the legislatures of other states are contemplating analogous legislation. Prior to the 1946 amendment, which added section 707 to the Abandoned Property Law, plaintiffs would also have been subject to the risk that persons entitled to the proceeds of the "abandoned" insurance policies might start suits in other states whose courts would refuse to recognize as valid the provision of section 1404 which purports to relieve an insurer making payment to the New York Comptroller from liability to anyone in respect of the abandoned property turned over to the Comptroller. The 1946 amendment gave the companies who had complied with the statute the right to acquire the claimants' rights against the state, by paying the claimants the amounts of their claims. Since a "service" charge of 1% (and not less than $3) must be deducted when a claim is paid by the state, the insurance companies, even if they went to the trouble of making payments to claimants from their own funds after they had already made equivalent payments to the Comptroller, would be obliged to suffer a loss of 1% of their second payment, as well as of all interest thereon to the time they received partial reimbursement from the state. It is, therefore, apparent that the amendment leaves the companies exposed to some risk of loss, and perhaps double liability, even if they comply with our statute.

Nearly all life insurance companies do business in many states, and many do business in almost every state. To al-

low every state in which they do business to claim the right to custody of the amount of every "abandoned" policy ever issued by them anywhere would result in chaos. Use of the residence of the insured as the determinant of jurisdiction would not be either logical or practical—not only because the insured's residence is immaterial under any recognized rule for ascertaining situs, but also for the reason that the residence of the insured is unknown to the insurer, in many instances at least (the complaint, which must be regarded as true on this motion, so alleges).

The authorities cited by the Attorney General as supporting the validity of the statute have no applicability to a legislative attempt to compel foreign corporations to turn over to the state unclaimed funds or property *which had their origin in business transacted outside the state.* In Anderson National Bank *v.* Luckett, 321 U. S. 233, the court held that the State of Kentucky had the right to compel the turnover to it of unclaimed bank deposits in a national bank *located in Kentucky* because (p. 241): "The deposits are debtor obligations of the bank, *incurred* and to be performed *in the state where the bank is located* and hence are subject to the state's dominion" as (p. 248) "a part of the mass of property within the state whose transfer and devolution is subject to state control." (Italics supplied.) In Security Bank *v.* California, 263 U. S. 282, in upholding a similar statute of California dealing with savings bank deposits, the court emphasized that (p. 283) "the bank is a California corporation and has its only place of business there," adding (p. 285): "The unclaimed deposits are debts due by a California corporation with its place of business there. * * * The debts arose out of contracts made and to be performed there. * * * The deposits are clearly intangible property within the state. Over this intangible property the state has the same dominion that it has over tangible property." In Provident Institution for Savings *v.* Malone, 221 U. S. 660, a Massachusetts savings bank attacked as unconstitutional a Massachusetts statute. As in the Anderson and Security Bank cases, *supra,* no question of a legislative attempt to exercise extra-territorial jurisdiction was presented. The situs of the claims of depositors against the Massachusetts savings bank was clearly in Massachusetts

where the deposits were made and payable. Brooklyn Borough Gas Co. *v.* Bennett, 154 Misc. 106, likewise involved no question of the right of a state to direct the turnover to it of property outside the state. The statute there involved related to deposits with public utility companies within the state and the action was brought by a domestic company. In holding the statute valid the court declared that (p. 114): "The jurisdiction of a State *over property within its borders* under circumstances indicating an abandonment by the owners has been repeatedly sustained" (italics supplied). In United States *v.* Klein, 303 U. S. 276, the statute dealt only with deposits in courts (p. 278, footnote) "in and for any district within this Commonwealth," and in a later phase of the same litigation (106 Fed. [2d] 213, certiorari denied, 308 U. S. 618) the court expressly stated (p. 215) that "in order to give jurisdiction to the state courts the *res* must have its situs within the territorial limits of the state."

That the "abandoned" property must be actually or constructively within the territorial limits of the state appears to be recognized by the Attorney General in Point I of this brief. He contends, however, that the domestic agencies of the foreign plaintiffs are to be treated as domestic corporations and that, therefore, "the situs of the debt or claim is in this State" (Point III, Attorney General's brief). The authorities cited do not support the proposition that a foreign corporation, licensed to do business in this state, is to be treated as a domestic corporation *in connection with business transacted outside the state and having no relation to its authority to do business here.* In Comey *v.* United Surety Company, 217 N. Y. 268, the holding was merely that a foreign corporation, licensed to engage in business in New York, and possessing a representative to receive service here, was not to be deemed absent from the state and could therefore avail itself of the statute of limitations as if it were a domestic company. Obviously this decision is not in point here. Although the court did say that "*for many purposes*" a foreign insurance company transacting business here "must be treated as a domestic insurance company and as domiciled in this state," it did not go so far as even to suggest that for the purpose of a taking over by the state

of abandoned claims *arising out of business transacted outside the state* the foreign corporate debtor was to be treated as domiciled in this state. In Morgan *v.* Mutual Benefit Life Ins. Co., 189 N. Y. 447, cited in the Comey opinion, *supra*, and also in the Attorney General's brief, the policy had been issued in New York, to a resident of New York, by a foreign life insurance company authorized to do business here. In an action brought by the legal representatives of a pledgee of the policy to establish an equitable lien thereon, it was held that service by publication upon non-resident children of the deceased insured was good because the action sought to enforce a lien upon a *res* within the state. In holding that the situs of the claim upon the policy was here, the court emphasized that *the contract of insurance was made in New York state* as part of the business which the company was licensed to transact here. In Martine *v.* The International Life Insurance Society of London, 53 N. Y. 339, the statement that foreign corporations doing business here "must be regarded as domiciled by the residence of its general agents and its local organization" was qualified by the preceding words "as to the business transacted here."

That the Attorney General recognizes that the statute is unconstitutional if applied to policies written outside the state seems evident from the fact that his brief contains a statement (p. 15) that the statute is not applicable "to policies written by a foreign branch of a foreign company, even though the policy be written on the life of a resident of this State." This statement does not, however, obviate passing upon the constitutionality of the statute, as applied to policies written outside the state, for two reasons. In the *first* place, there is nothing in the literal wording of the statute itself to indicate that it was intended to apply only to policies resulting from business done within the state. It does not follow that because the statute was restricted as to foreign companies, to those authorized to do business here, that its scope was intended to be limited to policies emanating from business done here by such companies. *Secondly*, and more important, the complaint alleges and it must be deemed true for the purposes of this motion to dismiss, that (paragraph 25L) the Comptroller is attempting to enforce the statute even where "a policy may have been delivered

in another State, and although a policy may have been applied for and obtained in another State." The Attorney General's brief does not dispute the claim that the Comptroller has been attempting to enforce the statute even as to policies having no relation to the companies' license to do business here, nor does it state that such efforts will cease. In the circumstances, plaintiffs are entitled to obtain a definite adjudication as to the validity of the statute and of the Comptroller's rights against them thereunder.

The Attorney General's contention, that plaintiffs are not aggrieved and cannot be heard to plead the alleged infringement of the constitutional rights of the insured or of beneficiaries under the policies, appears to overlook that, as previously pointed out, payment to the Comptroller might subject plaintiffs to double liability, complete or partial. If they make payment to the Comptroller in compliance with the statute they will never have another opportunity to raise the question. The words of Chief Justice Stone in Anderson v. Luckett, *supra*, are pertinent here (pp. 242-3): "But if the statute is deficient in its provisions for notice and opportunity for hearing so that the depositors would not be bound by any proceedings taken under it, the bank would be entitled to raise the question whether its obligations to the depositors would be discharged by payment of the deposits to the state."

The conclusion arrived at, that the statute is invalid in so far as it purports to apply to policies written outside of the state by foreign companies, does not, however necessarily require a holding that it is *entirely* void, i.e., even as to policies written in this state as part of the business which the foreign companies transact here pursuant to license. Thus in Mutual Life Ins. Co. of N. Y. v. Cohen, *supra*, a statute of New York that no life insurance company doing business in that state should have the power to declare forfeited or lapsed any policies thereafter issued or renewed, for nonpayment of premium or interest, unless a premium notice had been mailed as required by the statute, was held unconstitutional as to policies written by foreign companies outside the State of New York, but valid and enforceable as to policies written in New York by the domestic agencies of the foreign insurers. The statute in the cited case, like the

one here involved, purported to apply to all insurance written by any company doing business here, without containing any limitation to the insurance written here. That the unconstitutionality of the application of part of the Abandoned Property Law should not affect the validity of the statute in other respects is expressly provided for in section 1501 of that statute: "If any *part*, provision or section of this chapter, *or the application of any such part*, provision or section *in any particular respect*, shall be adjudged by any court of competent jurisdiction to be unconstitutional or ineffective *in whole or in part*, such judgment shall be confined in its operation to the particular provision or section or *application* directly involved in the controversy in which such judgment shall have been rendered and shall not affect, impair or invalidate the remainder of such provisions or sections or their *application* in other respects; and to the extent that such provisions or sections are not unconstitutional or ineffective, they shall remain in full force and effect." (Italics supplied)

It is necessary, therefore, to consider whether the Abandoned Property Law is constitutional in so far as it attempts to legislate with respect to claims on policies written by *domestic* branches or agencies of foreign life insurance companies *in this state* on the lives of residents of this state. As to such policies it would seem that the foreign companies ought to be treated as domiciled in this state. In Morgan v. Mutual Benefit Ins. Co., *supra*, the Court of Appeals said (p. 454): "As to such a claim the insurance company should be treated as a domestic insurance company and as domiciled in this state. * * * Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the Federal courts, and it has been sought to uphold the situs of the claim *in the state where the contract was made*, it has been sustained." (Italics supplied). In Martine v. The International Life Insurance Society of London, *supra*, the same court declared (p. 348): "*As to the business transacted here*, the company must be regarded as domiciled by the residence of its general agents and its local organization." (Italics supplied)

The statement in plaintiffs' brief that (p. 44) "Morgan v. Mutual Benefit Life * * * seems to have been overruled by Hanna v. Stedman, 230 N. Y. 326," may, perhaps, be true where the question to be determined is whether there is such a *res* within this state as would justify service by publication on a non-resident. [It is to be noted, however, that the holding in the *Hanna* case was merely that an action in equity for interpleader, in which no specific fund had been set aside, was an action *in personam* rather than an action *in rem*, while the action in the *Morgan* case was to declare and enforce a lien on a policy claim, and that the holdings may therefore not be necessarily inconsistent.] But the *Hanna* case can hardly be deemed authority for the proposition that the state where the contract of insurance was made is without jurisdiction to pass a statute such as the one here under consideration. The fact that the action of interpleader was held to be *in personam* rather than *in rem*, is no indication whatsoever that the court which decided the case would have held that New York State, where the main office of the insurance company was located, did not possess jurisdiction to compel a turnover to it of abandoned proceeds of the membership certificates. Indeed, the position of these very plaintiffs is that the situs of the amounts owing on the abandoned policies is "the State in which the insurance company is incorporated" (plaintiffs' brief, p. 19). As applied to the facts of the *Hanna* case, this would mean that this state would have had jurisdiction to escheat the proceeds of the membership certificates there involved had they been abandoned. The determination that an action of interpleader was not *in rem* and that the courts of this state had no jurisdiction without personal service within the state therefore has no bearing whatever on the question as to which state would have had power to take custody of the proceeds of the certificates had they been deemed abandoned for lack of claim.

As to policies *written or delivered in this state* by domestic agencies of foreign life insurance companies, the situation is, as heretofore pointed out, that the domicile of the debtor companies must be deemed to be in this state. In addition, the statute, by its terms, is applicable only to poli-

cies issued on the lives of New York residents. "A common sense appraisal of the requirements of justice and convenience in (the) particular conditions" (Severnoe Securities Corp. v. L. & L. Ins. Co., *supra*, p. 123) rules out the only other possible states, viz.: (1) the domiciles of those entitled to claim the proceeds of the policies, and (2) the states of incorporation of the foreign companies.

(1) The residences of those who might at any particular time be entitled to the proceeds of the policies (either as beneficiaries, assignees or otherwise), i.e., the creditors, are obviously scattered throughout the country and elsewhere, and, in the case of unclaimed funds, often, if not almost always, unknown to the insurance companies. It would, therefore, be impracticable, to say the least, to adopt the doctrine that the states of the residences of the creditors are the ones possessing jurisdiction to compel the debtor companies to turn over to them unclaimed funds. This was apparently recognized by the United States Supreme Court in Anderson National Bank v. Luckett, *supra*, for the jurisdiction of Kentucky was upheld although the depositor-creditors included non-residents of the state. The court went so far as to hold that the sheriff's posting of notice on the bulletin board of the county in which the property was located was sufficient notice to all depositors, considered in conjunction with the notice given by the passage of the statute and the taking over of the property by the state. Plaintiffs themselves oppose the use of the domiciles of those entitled to make claims on the policies as the criterion of situs, urging that (Plff's brief, p. 19) "the only practical situs for the purposes of such a statute would be the state in which the insurance company is incorporated, because that is known, whereas the domicile of the missing policyholder, or beneficiary, or assignee, is unknown".

(2) The only other possible criterion for determining situs is the state of incorporation of the foreign insurance company. Where the policy is written or delivered in New York by a domestic branch or agency of a foreign insurance company, there seems to be no justification for ascribing the situs of the claim to the main office of the company in another state. The fact that the policies may require

presentation of claims at the home offices, and that checks in payment are issued at the home offices, does not seem to be as potent or compelling a consideration, for the purposes of determining which state possesses jurisdiction, as the fact that the policies were written and/or delivered in New York by New York agencies of the companies and insured the lives of New York residents. The court accordingly holds that *as to such policies* the legislature of the State of New York had jurisdiction to direct the companies to turn over to its custody claims deemed to have been abandoned. It follows that compliance with the legislative mandate as to said policies will not expose the companies to the risk of double liability either as the result of suits brought by claimants or by reason of similar statutes of other states. Thus in Anderson National Bank v. Luckett, *supra*, the court said (p. 624): "Since the bank is a debtor to its depositor, it can interpose no due process of contract clause objection to payment of the claimed deposits to the state, *if the state is lawfully entitled to payment, for in that case* payment of the debt to the state, under the statute, relieves the bank of its liability to depositors". (Italics supplied.)

The other grounds upon which plaintiffs attack the statute as unconstitutional are equally available to domestic insurance companies. Since the 1940 amendment, which restricted the scope of the 1939 statute to policies issued by domestic companies on the lives of residents of this state, no domestic company has questioned the validity of the statute. The various contentions of the plaintiffs will be now considered *seriatim*.

It is urged that until due proofs have been filed with the companies of the occurrence of the contingencies which make the policies payable (such as death of the insured or expiration of the term of an endowment policy) the persons entitled to the benefits of the policies possess at most "inchoate or potential choses in action." Paragraph (a) of subdivision 1 of section 700 requires the turnover of unclaimed amounts of *matured* endowment policies and paragraph (c) makes like provision as to policies on the lives of residents *who have died*. Clearly, as to such policies, the failure to file formal proofs with the companies is no different in principle than the failure to produce savings bank books, the

production of which savings banks uniformly make a condition precedent of payment. Yet the United States Supreme Court has upheld the validity of statutes, similar to our Abandoned Property Law, which have been directed at savings banks (Provident Institution for Savings v. Malone, *supra*; Security Bank v. California, *supra*), notwithstanding the absence of any statutory requirement that the bank books be produced. The only other policies covered by the statute are those specified in paragraph (b), viz., where the insured, if living, would have reached the maximum age "of the Mortality Table" (this varies from about 96 to 100, according to the Table used). It would seem that as to the amounts of such policies there is ample basis for holding that the choses in action are no longer merely potential or inchoate, and for permitting a state to take over custody, not for itself, but for the benefit of the claimants if they should ever appear.

Plaintiffs further contend that they may possess all kinds of defenses to claims upon many of the policies and that it would be unconstitutional to deprive them of such defenses. The complaint fails, however, to state any facts showing the existence of any specific defense to any specific policy. *Certainly the fact that the companies may possess valid defenses to some of the policies does not render the statute unconstitutional, in so far as other policies are concerned to which there are no valid defenses.* It is probably true that the companies may possess certain defenses to some of the policies which it would be unconstitutional to take from them by compelling a turnover to the state of the amounts of the policies. The proper remedy of the companies in such situations is to refuse to turn over the amounts of such policies, and, if deemed advisable, to sue for declaratory judgments, alleging the appropriate facts in the complaint. It is to be noted that some defenses which the companies might be able to assert in suits brought against them on the policies may not be available to them as grounds for refusing to make a turnover to the state. Examples are defenses based on failure to file proofs of death, etc., and also, *perhaps*, defenses of the statute of limitations (see post).

Plaintiffs also argue that the statute in reality attempts to take from them their own property, since they possess no

fund or *res* specifically set aside for each policy. It is sufficient answer to observe that in the case of savings banks and national banks no specific fund or *res* is set aside for each depositor and yet similar statutes directed at such banks have been held constitutional by the highest court of the land (see *supra*) on the theory that a state may take into its custody choses in action presumed to have been abandoned.

The contention that the statute is invalid because it "attempts to substitute the State of New York as insurer under these policies, regardless of the rights and wishes of the insurance companies and their policyholders" (plaintiffs' brief, p. 21) and that the statute therefore impairs the obligations of contracts is inconsistent with the Supreme Court decisions upholding similar statutes as to national banks and savings banks. Even the fact that the statute in Provident Institution for Savings v. Malone, *supra*, provided for the state's paying a lower rate of interest than that payable by the plaintiff savings bank was held not to invalidate the enactment, the court declaring that it was not open to the bank to raise a question which only affected its depositors.

Plaintiffs make much of the fact that section 1400 of the Abandoned Property Law deprives them of the defense of the statute of limitations in cases where they would possess such defense in actions by claimants on the policies. Here again, the fact that as to some policies they might have a good defense based on the statute of limitations would not be ground for invalidating the Abandoned Property Law in respect of its application to cases where no such defense exists. Plaintiffs' proper remedy, to raise the question, is to allege the specific facts in suits for declaratory judgment confined to the specific policies as to which plaintiffs claim to have a good defense based on the statute of limitations. It is unnecessary, for the purposes of the present motion, to determine whether the Attorney General is correct in his contention (for which he cites Margiotti v. Cunningham, 337 Pa. 289; State v. Marshall & Illsley Bank, 291 N. W. Rep. 361; 30 C. J. S. [2d] 1170, and other authorities), that the statute of limitations does not extinguish the debt but only the creditor's remedy, and that, therefore,

escheat and similar statutes, which deal with the rights of the state, rather than those of the creditor, "are not rendered invalid by reason of the fact that the statute of limitations has run against the unknown depositor or person primarily entitled to the money or property." (30 C. J. S. [2d] 1170.)

The contention is also made by plaintiffs that the statute violates the provision of section 19 of Article III of the New York Constitution that "no claim against the State shall be audited, allowed or paid which, as between citizens of the State, would be barred by lapse of time." This provision obviously does not apply to the rights of claimants to funds taken into the state's *custody* for their benefit. The state under the statute does not take title to the abandoned funds. Furthermore, even if the claims were interpreted as being "against the State" within the meaning of the constitutional provision, the time would not commence to run in favor of the state until it obtained delivery of the funds. The purpose of the constitution is merely to assure that no longer statute of limitations will be enacted for claims against the state than those applicable to claims against citizens of the state.

Some mention is made in plaintiffs' brief of the expense of preparing reports and arranging advertising for which, it is claimed, the companies receive no compensation. No real point is made of this, however. Section 1409 provides that any amount paid to newspapers for any publication of names required by the statute shall be charged equally against all abandoned property held or owing at the time of the publication, except abandoned property of individual amounts of less than twenty-five dollars. The expense of preparing reports of abandoned claims, equally applicable to domestic and foreign corporations, is one which the state may impose without rendering the statute unconstitutional.

The claim made in the complaint that the statute constitutes an unreasonable burden upon interstate commerce has been withdrawn.

The motion for judgment on the pleadings dismissing the complaint is accordingly denied, in so far as the statute is claimed to be invalid as to policies written outside the state

by foreign branches of foreign insurance companies, and otherwise granted.

Dated, September 30th, 1946.

J. A. G.,
J. S. C.

EXHIBIT C

COURT OF APPEALS

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of July in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—July 2, 1947

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY & ors.,
Appellants,

ag'st

FRANK C. MOORE, Comptroller of the State of New York,
Respondent

Be It Remembered, That on the 26th day of March in the year of our Lord one thousand nine hundred and forty-seven, The Connecticut Mutual Life Insurance Company and others, the appellants in this cause, came here unto the Court of Appeals, by Ganson J. Baldwin their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Frank C. Moore, Comptroller of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by Nathaniel L. Goldstein, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Ganson J. Baldwin of counsel for the appellants, and by Mr. Abe Wagman of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments herein be and the same hereby are modified in accordance with the opinion herein and, as so modified, affirmed with costs to the defendant State Comptroller.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgments be modified in accordance with the opinion herein and, as so modified, affirmed etc., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

(S.) JOHN LUDDEN,
Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, July 2, 1947.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(S.) JOHN LUDDEN,
Clerk.

(Seal of the Court of Appeals.)

EXHIBIT D

COURT OF APPEALS

THE CONNECTICUT MUTUAL LIFE INSURANCE Co., et al.,
Plaintiffs-Appellants,

against

FRANK C. MOORE, Comptroller of the State of New York,
Defendant-Respondent

OPINION

LOUGHRAN, *Ch. J.:*

This case presents questions as to the validity of the New York Abandoned Property Law (Cons. Laws, Ch. 1) in its application to unclaimed life insurance funds.

The gist of the relevant operative sections of the statute is as follows. Abandoned property includes any moneys, held or owing by any life insurance company which have remained unclaimed for seven years by the person or persons entitled thereto under (1) matured life insurance policies on the endowment plan issued on the lives of residents of this State; (2) other kinds of life insurance policies issued on the lives of residents of this State, where the insured, if living, would have attained the limiting age under the mortality table on which the reserves are based; (3) life insurance policies issued on the lives of residents of this State who have died. (Sec. 700) On or before April first in each year, every life insurance corporation shall make a verified written report to the State Comptroller of all such abandoned property held or owing by it. (Sec. 701). Within thirty days thereafter such corporation shall publish a newspaper notice to the persons appearing to be entitled to any of such unclaimed moneys together with a statement (1) that a list of the names of such persons is on file and open to public inspection at the principal office of the corporation; (2) that payment of such unclaimed moneys will be made on or before the succeeding August thirty-first, to persons establishing their right thereto; and

(3) that in the succeeding September such unclaimed moneys still remaining will be paid to the State Comptroller, after which the insurance corporation shall cease to be liable therefor. (Sec. 702). Such payment shall be made to the State Comptroller at the time so fixed (Sec. 703). Thereupon the care and custody of such property shall pass to the State, the State shall be responsible for all claims established thereto pursuant to law less any lawful deductions, and the insurance corporation shall be relieved of liability for any such claim (Sec. 1404).* The State Comptroller shall publish annual statements of abandoned property received by him and not paid to claimants (Sec. 1402). Claims may be filed with him for such property and his determination thereof shall be subject to review in the courts (Sec. 1406). The statute shall be enforced notwithstanding the bar of any statute of limitations (Sec. 1400).

Whether these parts of the statute should be declared unconstitutional is the question for decision. The plaintiffs are a number of foreign life insurance companies that are licensed to do business in this State. The State Comptroller is the defendant. Upon motions made by all parties for a decision on the pleadings, Special Term annulled the Statute in so far as it pertains to policies of life insurance issued for delivery outside the State of New York, but upheld the challenged provisions in all other respects, except that the court put aside an issue as to the unlawful operation thereof upon defenses that life companies may have to claims upon their insurance contracts. From so much of the judgment of Special Term as denied relief prayed for by them, the plaintiff companies appealed to the Appellate Division, and, when a unanimous affirmance followed, they brought the case to this Court as of right on the basis of the constitutional questions that are directly involved. Since the defendant State Comptroller has at all times been content

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*Section 707, added by L. 1946, ch. 452, further provides:

"Any life insurance corporation which has paid to the state comptroller moneys deemed abandoned property pursuant to the provisions of this article may make payment to any person entitled to all or any part thereof and shall thereby acquire all of the rights of such person to payment by the state comptroller."

with the decision of Special Term, we are here concerned only with the effect of the statute upon presumptively abandoned proceeds of insurance policies issued upon the lives of residents of this State and delivered within its borders by companies doing business here, and what follows has reference to policies so issued and delivered and to no others.

Each of the plaintiff companies has its home office outside this State. By his motion for judgment on the pleadings, the defendant State Comptroller constructively admits the following allegations of the complaint: "The business of the plaintiffs, and other life insurance companies, is conducted from their Home Offices, where their officers, records, and securities are situated. Applications for policies are obtained by agents throughout the United States, and are sent to the Home Offices for consideration, and, if approved, the policies are written at the Home Offices and are sent to the agents for delivery to the applicant. Premiums are payable at the Home Offices, or, if paid to an agent, are forwarded to the Home Offices. Claims under policies must be made at the Home Offices, under the terms of the policies, which provide that upon receipt at the Home Office of 'due proof' of death, or other event, the company will pay, etc., and all claims are considered at the Home Offices, and, if allowed pursuant to the terms of the policies, are paid by checks drawn at the Home Offices." On the strength of the above circumstances, the plaintiff companies insist that their debtor obligations under the contracts in question are beyond the territorial reach of the power of the New York Legislature.

Other defects imputed to the statute by the companies may be summarized in this manner: it cancels provisions of insurance contracts whereby the proceeds become payable only upon filing of due proof of specified events, e.g., death, age, survival, and upon surrender of the policy; it takes away defenses to policies, e.g., misrepresentation and breach of conditions; if given retrospective effect, it will operate to revive claims which at the time of its enactment were barred by the statute of limitations. In the foregoing aspects, the statute, as the plaintiff companies see it, is not only repugnant to the due process clauses, but also

impairs the obligation of contracts, takes private property for public use without making just compensation therefor and runs foul of the fundamental demand for the equal protection of equal laws. (U. S. Const. Art. I Sec. 10 and 14th Amendment; N. Y. Const. Art. I, Secs. 6, 7a).

The reason of the statute is plain enough. Section 102 says: "It is hereby declared to be the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state, and this chapter shall be liberally construed to accomplish such purpose." (See *Moufang* v. *State of New York*, 295 N. Y. 121, 127-128). In accordance with the object first so stated, the Legislature has substituted the State for the plaintiff companies as debtor upon the policies in question and at the same time has secured to the policy-creditors appropriate notice thereof with an opportunity to be heard and with the further right to resort to the courts should payment by the State be refused. Such a statutory scheme fulfills the procedural requirements of due process (*Anderson National Bank* v. *Luckett*, 321 U. S. 233).

In the case just cited—where approval was given to a like scheme for State administration of abandoned bank deposits remaining in a national bank within the State—the Court said: "The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion" (321 U. S. at p. 233). Here the circumstances relied upon as a justification for the exercise of State power are not essentially different. True, the policies in question were committed to writing at the home offices of the plaintiff companies in foreign states and were to be paid by checks mailed therefrom. But the policies were issued upon the lives of residents of this State and were delivered within its borders by corporations doing business therein. "Effectiveness of a policy (as the complaint says) usually depends upon its being 'delivered and the first premium paid during the lifetime and good health of the insured,' a provision which is usually contained in the policies or in the application for insurance, copies of which are attached to policies when issued and made a part thereof." Thus

the State of New York—where the policies were delivered and where presumably the first premiums were paid—was the place where the contracts in question were made. (*Northwestern Life Ins. Co.* v. *McCue*, 223 U. S. 234; *U. S. Mortgage & Trust Co.* v. *Ruggles*, 258 N. Y. 32, 38; Restatement of Conflict of Laws, Sec. 318). On the whole, then, it makes no difference where the policies were signed or where payment thereof was to be initiated. For the core of the debtor obligations of the plaintiff companies was created through acts done in this State under the protection of its laws and the ties thereby established between the companies and the State were without more sufficient to validate the jurisdiction here asserted by the Legislature. (See *Curry* v. *McCanless*, 307 U. S. 357; *Hoopeston Co.* v. *Cullen*, 318 U. S. 313; *International Shoe Company* v. *Washington*, 326 U. S. 310. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408; *Harris* v. *Balk*, 198 U. S. 215; *Morris Plan Industrial Bank of New York* v. *Cunning*, 295 N. Y. 324; *Feinman* v. *Marks*, 294 N. Y. 367).

The contention that the statute unwarrantably rescinds contractual conditions precedent such as the requirements of surrender of policies and filing of due proof of death or other specified events was rejected by the Special Term on the authority of *Provident Institution for Savings* v. *Malone*, (221 U. S. 660),—a case which sustained a statute whereby banks were commanded to pay over unclaimed deposits to a State without production of pass-books as required by agreements of deposit. The cited case is quite in point. Besides, the present statute calls upon the plaintiff companies to surrender moneys to this State only after maturity of the policy obligations and at a time when the State, as the then legal representative of the parties entitled to such payment, may be regarded as making demand therefor in their behalf.

"If the statute is retroactive", says the plaintiff companies, "it illegally attempts to revive claims barred by the statute of limitation." On its face, the statute appears to have been meant for retrospective application, seeing that it became law on April 23, 1943, but did not take effect until June 1, 1944 (L. 1943 Vol. 1, pp. 1383 and 1415), and that the reports of abandoned property called for by section

701 must be made on or before the first day of April "in each year." Furthermore, the clearly procedural character of the statute is reason enough for giving it a retrospective application (*Shielcrawt* v. *Moffett*, 294 N. Y. 181, 188); and if abandoned claims are to be revived thereby, this will be no offense against constitutional law. (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 316; *Matter of New York University* (*Moore*), 296 N. Y. 913).

As has already been indicated, the court at Special Term did not decide whether or not the statute illegally deprives the plaintiff companies of defenses to claims upon their insurance contracts. We see no reason why that issue should go undetermined (Cf. *Quaker Oats Co.* v. *City of New York*, 295 N. Y. 527, 538). The plaintiff companies, as we have said, cannot resist payment to the defendant Comptroller because of (1) the statute of limitations or (2) non-compliance with policy provisions calling for due proof of death or of other designated contingency or (3) failure to surrender a policy. Except for these restrictions, however, the statute (Sec. 700) leaves any of the plaintiff companies wholly free to set up any complete or partial defense whereby it may establish that no moneys are "held or owing" by it on a particular policy, or that only some fraction of the face amount of the contract is payable thereon. Maybe, as the companies say, they cannot effectually prepare possible defenses without a proof of claim, but inconvenience of that kind does not nullify the statute. Accordingly paragraph 3 of the judgment of Special Term —which reserved decision on the question whether the statute wrongfully does away with defenses to policies— should be struck out.

As so modified, the judgments should be affirmed, with costs to the defendant State Comptroller.